

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD MAURICE MILLER,

Defendant-Appellant.

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UNPUBLISHED  
September 3, 2009

No. 285668  
Wayne Circuit Court  
LC No. 07-021425-FC

Before: Saad, C.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

Defendant was found guilty by a jury of armed robbery, MCL 750.529, and was sentenced to 45 months' to 15 years' imprisonment. He appeals as of right. We affirm.

Defendant's conviction arises from an incident in which he entered a group adult foster home, robbed the worker of her purse and a necklace, and took petty cash from the office while possessing a handgun in the waistband of his pants. At one point, defendant threatened the worker, stating, "don't make me use it," in reference to the gun.

On appeal, defendant first argues that, because the jury was not instructed that the lesser-included offense of unarmed robbery is a specific intent crime, he was denied a fair trial. Defendant failed to raise this issue at the sentencing hearing.

To preserve a challenge to jury instructions on appeal, a party must object to or request an instruction before the jury deliberates. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000); MCR 2.516(C). An affirmative statement by defense counsel that there are no objections to the jury instructions constitutes express approval of the instructions, waiving appellate review. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004). In this case, defendant did not request an instruction that unarmed robbery is a specific intent crime. In fact, defense counsel expressly approved the jury instructions with the affirmative statement that he had no objection to the instructions after they were given. Therefore, defendant has waived this issue on appeal. *Id.*

Even if the issue were not waived, the trial court did not commit plain error by failing to instruct the jury that unarmed robbery is a specific intent crime. See *People v Carines*, 460 Mich 750, 752-753; 597 NW2d 130 (1996). The trial court expressly informed the jury of the specific intent element required for armed robbery. Then, the court instructed the jury to consider the

identical specific intent element when considering whether defendant was guilty of the lesser offense of unarmed robbery. Twice the court instructed the jury that the intent element for unarmed robbery was identical to the intent element of armed robbery. Thus, the court instructed that unarmed robbery is a specific intent crime and did not commit an error.

Next, defendant argues that the scoring of Offense Variables (“OVs”) 4 (10 points) and 10 (5 points) were incorrect resulting in an upward departure from the correct range. Defendant’s challenge to the scoring of OV 4 was objected to and properly preserved. Defendant’s challenge to OV 10 was not raised at sentencing, in a motion for resentencing, or in a proper motion for remand and is, therefore, unpreserved for appeal. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004), citing MCL 769.34(10).

Generally, we review a trial court’s scoring decision “to determine whether the trial court properly exercised its discretion and whether the evidence of record adequately supported a particular score.” *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005) (citation omitted). A trial court’s scoring decision “for which there is any evidence in support will be upheld.” *People v Endres (On Remand)*, 269 Mich App 414, 417; 711 NW2d 398 (2006). Furthermore, we review “de novo as a question of law the interpretation of the statutory sentencing guidelines.” *Id.* Where the challenge to the scoring of this OV was not preserved, our review is limited to plain error affecting defendant’s substantial rights. *Kimble, supra* at 312. A plain error in the calculation of the sentencing guidelines range that increases the length of the defendant’s sentence constitutes plain error affecting substantial rights. *Id.* at 313 and n 5

Defendant argues that OVs 4 and 10 were incorrectly scored. OV 4 may be scored at 10 points if “[s]erious psychological injury requiring professional treatment occurred to a victim.” MCL 777.34(1)(a). “There is no requirement that the victim actually receive psychological treatment.” *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). The worker at the foster home fell down and started screaming and kicking as defendant walked toward her. Defendant grabbed her and pulled her up. At one point, defendant threatened her stating, “don’t make me use it,” in reference to the gun. As a result, the worker has trouble sleeping, is “scared all the time,” and is afraid to go places alone. This evidence is sufficient to support the trial court’s scoring of OV 4. See *People v Drohan*, 264 Mich App 77, 90; 689 NW2d 750 (2004).

Defendant received 5 points under OV 10. However, defendant failed to object to the trial court’s scoring of OV 10 at the time of sentencing and he did not make a motion to remand in this Court. The failure to object to the scoring of the guidelines in the trial court waives appellate review of the issue. *People v Daniels*, 192 Mich App 658, 674; 482 NW2d 176 (1992). In any event, because the trial court’s scoring of OV 4 was correct, a change in the score for OV 10 would not result in a change in the guidelines’ range. Therefore, we need not reach the merit of defendant’s argument. *People v Jarvi*, 216 Mich App 161, 164; 548 NW2d 676 (1996).

Affirmed.

/s/ Henry William Saad  
/s/ William C. Whitbeck  
/s/ Brian K. Zahra